FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1614

IN THE

Supreme Court of the United States

POOH BAH ENTERPRISES, INC., *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF OF PETITIONERS

MICHAEL A. ABRAMSON
ARNSTEIN & LEHR LLP
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7155

ROBERT CORN-REVERE
(Counsel of Record)
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 973-4225

DAVID A. EPSTEIN
DAVID A. EPSTEIN, LTD.
30 North LaSalle Street
Suite 2900
Chicago, Illinois 60602
(312) 553-1479

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. STRICT VERSUS INTERMEDIATE SCRUTINY	1
II. THE CITY'S EVIDENTIARY BURDEN	6
III. LACK OF DUE PROCESS	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)	4, 5
181 South Inc. v. Fischer, 454 F.3d 228 (3d Cir. 2006)	4
Abilene Retail #30, Inc. v. Bd. of Comm'rs, __ F.3d __, No. 05-3473, 2007 WL 1982130 (10th Cir. July 10, 2007)	8
Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702 (7th Cir. 2003)	5
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)	1, 4
City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002)	*passim*
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)	1, 2
Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860 (11th Cir. 2007)	8
Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288 (5th Cir. 2003)	5, 8
Fantasy Ranch Inc. v. City of Arlington, 459 F.3d 546 (5th Cir. 2006)	8
Flanigan's Enters., Inc. v. Fulton County, 242 F.3d 976 (11th Cir. 2001)	8
G&V Lounge, Inc. v. Michigan Liquor Control Comm'n, 23 F.3d 1071 (6th Cir. 1994)	5
G.M. Enters., Inc. v. Town of St. Joseph, 350 F.3d 631 (7th Cir. 2003)	5
Giovani Carandola, Ltd. v. Bason, 303 F.3d 507 (4th Cir. 2002)	5, 8
Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir. 1982)	5
Gregg v. Georgia, 428 U.S. 153 (1976)	2
Hamling v. United States, 418 U.S. 87 (1974)	3
Heideman v. South Salt Lake City, 348 F.3d 1182 (10th Cir. 2003)	5

TABLE OF AUTHORITIES—Continued

	Page
Illusions-Dallas Private Club, Inc. v. Steen, 482 F.3d 299 (5th Cir. 2007)	4, 5, 8
Marks v. United States, 430 U.S. 188 (1977)	2, 3
Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251 (11th Cir. 2003)	8
Perry v. Sinderman, 408 U.S. 593 (1972)	5
R.V.S., LLC v. City of Rockford, 361 F.3d 402 (7th Cir. 2004)	5, 8
Ranch House, Inc. v. Amerson, 238 F.3d 1273 (11th Cir. 2001)	5
Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir. 2000)	5
Steiner v. County Comm'rs of Caroline County, 490 F.Supp.2d 617 (D. Md. 2007)	8
Top Flight, Inc. v. City of Inkster, No. 06-12399, 2007 WL 643897 (E.D. Mich. Feb. 26, 2007)	7
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	4
STATUTE, RULE, AND ORDINANCE	
Municipal Code of Chicago, § 4-60-140(d) (1999)	*passim*
OTHER	
Bryant Paul, Daniel Linz, and Bradley J. Shafer, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. LAW & POLICY 355 (Spring, 2001)	7

TABLE OF AUTHORITIES—Continued

Page

Daniel Linz, Mike Yao, and Sahara Byrne, *Testing Supreme Court Assumptions in California v. LaRue: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments That Sell Liquor?*, 7 COMM. L. REV. 23, 44 (2007)..... 7

INTRODUCTION

The City of Chicago's Opposition ("Opp.") well illustrates the doctrinal confusion that has divided the lower courts in seeking to determine whether a regulation of sexually oriented entertainment is content neutral, and, if so, how to apply the evidentiary burdens necessary to justify the regulation. Like the Illinois Supreme Court below, the City simply assumes that intermediate scrutiny is the correct standard of review *because* the ordinance at issue regulates sexually oriented entertainment without regard to content neutrality. The City also erroneously contends that it has fulfilled its "light" evidentiary burden notwithstanding the trial court's finding that "the record [is] devoid of any proof of the existence of or even the possibility of potentially harmful secondary effects" (App. 147), and despite the fact that Petitioners were not permitted to complete their case. The Opposition blithely overlooks a growing split among the circuit courts on each of these issues, and thus highlights why review by this Court is warranted.

I. STRICT VERSUS INTERMEDIATE SCRUTINY

1. The City does not question the settled law that strict scrutiny must be applied when regulation of expressive conduct is content-based unless the government can establish a neutral purpose. Petition for Certiorari ("Pet.") at 11-13. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). However, it argues that the court below properly applied intermediate scrutiny after it found that the "only motivation" for Chicago Municipal Code § 4-60-140(d) ("Coverage Ordinance") was as a content neutral regulation of "negative secondary effects." Opp. at 13-14. What is missing from the City's analysis is any evidence of legislative purpose for the ordinance at issue in this case. However, "a city must advance some basis to show that its

regulation has the purpose and effect of suppressing secondary effects." *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring).[1]

a. The City, like the court below, relies exclusively on testimony about prostitution on Chicago's Rush Street in years past and to legislative findings for a 1993 zoning ordinance, with which Pooh Bah has always complied, that was adopted *fifteen years after the Coverage Ordinance*. Opp. at 3-6, 13-14; App. 31-36. Neither that testimony nor the purported "findings" speak to the motivations for enactment of the 1978 Coverage Ordinance. As Justice Freeman explained, the court below made a "clear and plain error" in "incorrectly citing the legislative history and preambles of the City's 1993 adult use zoning ordinance as if that were the legislative history and original city council intent." App. 79 (Freeman, J., dissenting from denial of reh'g). The Opposition merely repeats that error.

b. The City's reliance on "findings" made fifteen years later to justify the 1978 Coverage Ordinance confirms that this case implicates the deep split of authority on whether post-enactment evidence can be used to show a content neutral purpose. *See* Pet. at 17 (citing cases). The City expressly acknowledges the circuit split. Opp. at 17. It says only that "lawmakers could not have known to include a statement articulating their secondary effects rationale" because the Coverage Ordinance was enacted before *Renton*. *Id. See also id.* at 16. Not only is this a frank admission that the City has zero evidence of a content neutral purpose for the Coverage Ordinance, it is no answer to the doctrinal question raised by the instant Petition. The City's excuse for why it lacks evidence of legislative intent is irrelevant. It is settled that the showing of a content neutral purpose, required by *Renton* and

---

[1] For purposes of this analysis, Justice Kennedy's opinion may be considered the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977); *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976).

its progeny, applies fully to this case even if that requirement was articulated in later cases. *See, e.g., Marks*, 430 U.S. at 196-197; *Hamling v. United States*, 418 U.S. 87, 102 (1974).

c. The *only* contemporaneous legislative statement of purpose for the 1978 Coverage Ordinance indicates that it was intended to regulate content, *i.e.*, to "control[ ] the form of entertainment" in venues that serve alcohol. (App. 157.) The City disputes that this statement demonstrates a content-based purpose, yet admits as much by characterizing it as "a generic description of the legislation included by the committee in its recommendation to the City Council." Opp. at 17 n.9. Even if the City's conclusion is accepted, this leaves no record support for the City's claim of content neutrality. [2]

d. The City subsequently sought to fill this vacuum by proffering various post-enactment theories of legislative purpose. However, the City abandoned various content neutral justifications in the course of litigation. Pet. at 20-21. Significantly, the City relied heavily on a content-related justification for the Ordinance—that the effect on the patron of combining alcohol and erotic dancing causes crime. App. 32, 38. The Court below agreed with the City and relied on content-based justifications for the law—*i.e.*, not secondary effects, but rather direct effects on patrons of adult entertainment. App. 37-40, 43. *See also* App. 68 (Freeman, J., dissenting from denial of reh'g) (the Court justified ordinance based on "supposed effects of the regulated conduct on its audience"). If this indeed was the City's purpose, it should have been subject to strict scrutiny. Pet. at 15-16.

2. The City's argument that the ordinance regulates alcohol sales—and not expression—is a red herring. Opp. at 8-14. Even where government claims to target the putative

---

[2] The City also admits that the Illinois Supreme Court may have "misconceived the legislative history," but fails to grasp that this error leaves it without any content neutral justification whatsoever for the Coverage Ordinance. *See* Opp. at 17 n.9.

secondary effects of adult entertainment, there can be no pretense it is not regulating speech but only liquor licensing. *See Pap's A.M.*, 529 U.S. at 294-95 (allowing "States ... to regulate secondary effects" necessarily involves "intrusions on expression") (discussing, *inter alia*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). Since *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), and certainly since *Pap's A.M.*, there can be no serious claim that regulating exotic dancing in liquor-serving venues "do[es] not restrict expression," as the City argues here. Opp. at 10 n.6. In *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 306-07 (5th Cir. 2007) the Fifth Circuit cataloged the Third, Fourth, Sixth, Seventh, and Eleventh Circuit cases that concluded that *44 Liquormart* "requires that alcohol regulations of [sexually oriented businesses] be analyzed in light of the First Amendment." Precedent from six Circuits shows that it is hardly just "two cases . . . in which a restriction on sexually explicit dancing at liquor-licensed establishments" was analyzed under the First Amendment, as the City claims. [3]

Using license revocation as the means of punishment does not change the fact that the activity being punished is speech. Here, the City maintains that Pooh Bah may keep its liquor license and avoid punishment if it alters the type of speech it provides. But a "state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or an entertainment permit, on an agreement to refrain from exercising

---

[3] *See* Opp. at 13. *44 Liquormart* sounded the death knell for the argument that the Twenty-First Amendment provides a separate basis for regulating speech. 517 U.S. at 516. It also is clear that the *Alameda Books* analysis applies to adult entertainment regulation imposed through alcohol license limitations. *See Illusions-Dallas*, 482 F.3d at 306-07. The City's reliance on pre-*44 Liquormart* cases is unavailing, Opp. at 9, 10-11 & n.7, as is its citation of *181 South Inc. v. Fischer*, 454 F.3d 228, 233 (3d Cir. 2006) (Third Circuit expressly declined to base its holding on the argument that a regulation is constitutional where a state prohibits alcohol sales in "inappropriate locations").

one's constitutional rights, especially one's right to free expression." *G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071 (6th Cir. 1994) (citing, *inter alia*, *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). *See 44 Liquormart*, 517 U.S. at 513 ("Even though government is under no obligation to provide . . . a particular benefit," such as "cho[osing] to license . . . liquor" purveyors, "it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right.").

3. The City's claim that no circuit conflict exists regarding the nature of the government's burden to show a content neutral purpose is plainly wrong. Opp. at 15. It ignores the cases cited in the Petition which held that courts cannot "simply assume that the legislature's purpose was to combat the negative impact on health, safety, and welfare," *e.g.*, *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1282-83 (11th Cir. 2001); *R.V.S., LLC v. City of Rockford*, 361 F.3d 402, 408 (7th Cir. 2004); *see also G.M. Enters., Inc. v. Town of St. Joseph*, 350 F.3d 631, 638 (7th Cir. 2003); *Schultz v. City of Cumberland*, 228 F.3d 831, 844 (7th Cir. 2000), as distinguished from cases presuming content neutrality "even without a legislative record to suggest a purpose unrelated to speech." *E.g.*, *Illusions-Dallas*, 482 F.3d at 309 (5th Cir. 2007); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 712 (7th Cir. 2003); *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1195 (10th Cir. 2003); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 292 (5th Cir. 2003); *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 947 (11th Cir. 1982); *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 514 (4th Cir. 2002). The cases show a significant amount of confusion on this key threshold question not only between different circuits, but among different panels of the same circuit. Accordingly, clarification by this Court is urgently needed.

II. THE CITY'S EVIDENTIARY BURDEN

1. The City entirely misses the point of the second issue presented in the Petition. The petitioners seek clarification by this Court of the government's burden of proof where the litigants have cast doubt on the city's evidence and theories, and where the trial court has found that the record lacks any proof of potentially harmful secondary effects. (App. 147). The City argues that it need only show that it "reasonably believed" the Coverage Ordinance would help combat secondary effects, and that petitioners "do not even attempt to identify a conflict with respect to the second question [presented in the Petition]." Opp. at 18-26. This assertion ignores a significant split among the circuit courts as to the appropriate evidentiary burden and advocates the absurd position that local governments need offer no tangible evidence other than their beliefs about possible secondary effects.

a. In *Alameda Books*, this Court explained that, in order to show a regulation furthers a substantial government interest under intermediate scrutiny, the government must show a connection between the speech regulated and undesirable secondary effects. *Alameda Books*, 535 U.S. at 434-38. Although the City correctly notes that it may seek to satisfy this burden by relying on any evidence that is "reasonably believed to be relevant" to this inquiry, *id.* at 438, it utterly ignored the rest of the Court's holding: "If plaintiffs succeed in casting doubt on a municipality's rationale . . . the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439. *See also id.* at 453 (Kennedy, J., concurring) ("If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny."). In such a case, it simply will not do for the government to assert, contrary to the evidence, that it nevertheless was persuaded by its own asserted secondary effects rationale and that it has no burden to support its conclusion beyond its own "reasonable belief." The City's suggestion

that once doubt is cast on the government's rationale, its burden to respond is *de minimis* would render meaningless this Court's insistence that governments not rely on "shoddy data" to avoid strict scrutiny when regulating adult entertainment.

b. That is precisely what happened in this case. After hearing all the evidence and assessing the credibility of the City's witnesses, the trial court found the City had failed to show "even the possibility of potentially harmful secondary effects." (App. 147.) Although Pooh Bah was able to present some evidence, if it had been allowed to complete its case after the Illinois Supreme Court's reversal of the trial court ruling, it would have been able to introduce expert testimony as well as published studies on the absence of secondary effects in these kinds of venues, thus further demonstrating the shoddy nature of the City's data.[4] The Illinois Supreme Court's failure to remand for further evidence contravenes *Alameda Books*, where this Court remanded for further proceedings. 535 U.S. at 432-33, 343. *See also* Section III, *infra.*

2. Although *Alameda Books* requires a process by which petitioners may challenge the government's asserted rationale and shift the evidentiary burden back to the municipality, the lower courts have been greatly divided in ascertaining and applying these burdens. *E.g., Top Flight, Inc. v. City of Inkster*, No. 06-12399, 2007 WL 643897, at *9 (E.D. Mich. Feb. 26, 2007) ("Stating the precise parameters of a munic-

---

[4] *See, e.g.*, Daniel Linz, Mike Yao, and Sahara Byrne, *Testing Supreme Court Assumptions in California v. LaRue: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments That Sell Liquor?*, 7 COMM. L. REV. 23, 44 (2007) ("Results from previous studies and the results from the present study suggest either no relationship or even a negative relationship between the presence of alcohol serving adult entertainment establishments and adverse secondary effects in the form of sex related crime activity."); Bryant Paul, Daniel Linz, and Bradley J. Shafer, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. LAW & POLICY 355 (Spring 2001).

ipality's burden to support its asserted secondary effects is difficult . . . due to the splintered nature of the leading Supreme Court opinions in this area of law."). Some courts require the government's rationale to be rebutted by clear and convincing evidence, although this Court has never spoken to that question. *Compare Giovani Carandola*, 303 F.3d at 516; *Steiner v. County Comm'rs of Caroline County*, 490 F.Supp.2d 617, 625 (D. Md. 2007), *with, e.g.*, *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1271-72 (11th Cir. 2003) (substantial and unanswered factual challenges are sufficient to cast doubt on government rationale). Others have reached sharply divergent conclusions about the government's evidentiary burden. *Compare Rockford*, 361 F.3d at 411-13 (government failed to cite sufficient evidence of connection between adult entertainment and secondary effects); *Encore Videos*, 330 F.3d at 294-95 (same); *Flanigan's Enters., Inc. v. Fulton County*, 242 F.3d 976, 985 (11th Cir. 2001) (court may not "presume the evidence needed" to show secondary effects); *Illusions-Dallas*, 482 F.3d at 313 (striking down ordinance on "record [ ] completely devoid of any evidence that a secondary effects problem exists"), *with Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 560-61 (5th Cir. 2006) (even where plaintiffs' expert's report showed that "no arrests at strip clubs had occurred for prostitution, drugs, or assault," plaintiffs failed to cast doubt on government's secondary effects rationale).

This is not, as the City attempts to frame it, a situation in which some local governments have provided sufficient evidence to support their regulations while others have not. Opp. at 22-23. Rather, the different outcomes have resulted from the lack of clear guidance from this Court as to the respective burdens of proof. Even in the brief time since the Petition was filed, further dissension among the Circuits emerged. *Compare Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 874-85 (11th Cir. 2007) (finding City carried its burden to show secondary effects despite

significant expert testimony to the contrary), *with Abilene Retail #30, Inc. v. Bd. of Comm'rs*, __ F.3d __, No. 05-3473, 2007 WL 1982130, at *9 (10th Cir. July 10, 2007) (in attempting to meet initial burden, government may not "rely on the existing body of prepackaged secondary effects studies" but instead must "show[ ] that the evidence . . . relied [on] is germane to their local experience"); *id.* at *13-17 (Ebel, J., concurring) (disagreeing with majority that government met its initial burden but stating that plaintiff cast sufficient doubt on government's secondary effects rationale). This continuing confusion cries out for review by this Court.

III. LACK OF DUE PROCESS

The City declined to address the merits of the due process question presented in the Petition based on its erroneous claim that the issue had been waived and its mistaken view that it is not a distinct issue. It is wrong on both counts.

1. The claim that Pooh Bah waived the due process issue is absurd. It was the Illinois Supreme Court's refusal to allow further evidence of the First Amendment issues on remand that created the due process problem. *See* Pet. at 22. Pooh Bah thus could not have "failed to forward a due process argument in their [sic] appeal to the Illinois Supreme Court," Opp. at 26, because the due process violation had not yet occurred. Pooh Bah briefed the due process violation on rehearing before the state high court. *See* App. 65 (Freeman, J., dissenting from denial of reh'g) ("in [the] rehearing petition . . . this court's opinion . . . violates the 'constitutional required procedures for intermediate scrutiny * * * resulting in a denial of due process'") (ellipses added, asterisks original). Petitioners also continue to press the issue before this Court. The issue has not been waived.

2. Contrary to the City's contention that due process "questions have no significance outside this case," Opp. at 26, this procedural question goes to the heart of *Alameda Books'* burden shifting process. *Alameda Books* makes clear that,

when a challenger raises questions about the asserted rationale by showing data and/or reasoning flaws, the City faces a "burden [that] shifts back to [it] to supplement the record with evidence renewing support . . . that justifies its ordinance." 535 U.S. at 439. *See id.* at 453 (Kennedy, J., concurring). Due process requires that affected businesses must have a chance to "cast doubt" on the government's rationale for regulating adult entertainment. *Id.* at 438-39. In this case, however, Pooh Bah was not afforded a "full and fair opportunity" to make this showing, Opp. at 26, because the trial court interrupted Pooh Bah's case—to conclude the trial by holding the City did not meet its initial burden—before Pooh Bah could finish presenting evidence. Pet. at 4, 22. This Court must clarify what evidentiary procedures are required in these circumstances.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

MICHAEL A. ABRAMSON
ARNSTEIN & LEHR LLP
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7155

ROBERT CORN-REVERE
(Counsel of Record)
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W.
Washington. D.C. 20006
(202) 973-4225

DAVID A. EPSTEIN
DAVID A. EPSTEIN, LTD.
30 North LaSalle Street
Suite 2900
Chicago, Illinois 60602
(312) 553-1479

Counsel for Petitioners

FILED
AUG. 24 2007

(3)

No. 06-1641

IN THE

Supreme Court of the United States

JUAN C. ESPINOSA, *et ux.*,

Petitioners,

v.

UNION COUNTY, NEW JERSEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

THOMAS D. SHEA, JR.
384 Starling Drive
Bozeman, MT 59718
(406) 599-8649

Counsel for Petitioners

210670

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

The Respondents did not address the simple and undisputed bases for the Petition for a Writ of Certiorari.

First, it was "undisputed" that Petitioner had a constitutionally protected "property interest in his job" as a jail guard at all times including when the Respondents ordered him to return to the jail. (App. 16a) (The Respondents' reliance on *Gilbert v. Homar*, 520 U.S. 924 (1997), provides no support for the lower Court's *sua sponte* conclusion that the Petitioner had a "weak" constitutional interest in his job.)

Second, it is undisputed that the Respondents admitted that the Petitioner "would be unable to return to work" in the jail and the lower Court took as true Petitioner's assertion that he "could not return to work." (App. 23a, 27a.) (The Petitioner was the first guard to break the Blue Wall of Silence. Also, the Petitioner was the only guard who tried to help the abused detainees, identified by the detainees as having tried to help them, praised as courageous in writing by the Prosecutor for his voluntary testimony, and permitted to leave the jail for safety reasons.)

Third, it was undisputed that Petitioner repeatedly pleaded for comparable alternative employment outside the jail and the Respondents never made any efforts to find alternative employment although they freely admitted that such positions were available.

Fourth, it is undisputed that the Petitioner now holds a nontenured position with a lower rank, earns less than half his prior salary, and will lose in excess of a million dollars through his retirement given his reduced salary, loss of benefits and pension, and overtime pay.

It is respectfully submitted that the termination of Petitioner's tenured employment for not returning to the jail was unlawful, and inherently discourages any law enforcement officer from voluntarily, and truthfully, testifying against a fellow officer in the future.

CONCLUSION

Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

THOMAS D. SHEA, JR.
384 Starling Drive
Bozeman, MT 59718
(406) 599-8649

Counsel for Petitioners